

Ignored and Misunderstood: Privacy Rights and Medical Information in the Canadian Workplace

by Kate A Hughes and Emily Dixon¹

I. Introduction

In 1881, an English Appellate court said: "[I]t is well established that persons do not by virtue of their status as employees lose their right to privacy and integrity of the person a person."² In Canada, over 130 years later, we are still very much in the infancy of understanding privacy rights and integrity of the person for workers when it comes to medical information in the workplace.

Courts and labour arbitrators have made strong statements in favour of medical privacy in the workplace and given lip service to its importance. For instance one Canadian arbitrator stated:

Both subjectively and objectively, personal medical information is confidential personal information. The confidentiality of the doctor/patient relationship and personal medical information is universally and legislatively recognized as one of the most significant privacy rights in modern Canadian society.³

Yet, there are many assumptions and misconceptions about what has been called "one of the most significant privacy right in modern Canadian society." Employers continue to ask for overly broad medical information; arbitrators rarely consider or apply privacy statutes.

Medical issues frequently arise in labour arbitration in a range of matters including short and long term sick leave administration and entitlements to benefits, disability accommodation, monitoring of attendance programs, fitness to return to work following a leave, drug and alcohol testing and defences to discipline. This paper does not attempt to review all these issues. This paper largely focuses on reviewing the statutory privacy scheme that has been put in place, jurisdiction by jurisdiction, recently across Canada. We review how labour arbitrators, and to a lesser extent courts and privacy commissioners, have applied the privacy acts in the workplace, focusing on the last five years, where now all Canadian jurisdictions have statutes with express, and often robust, privacy protections.

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² (*Latter v Braddell* (1881), 50 LJQB 448 (CA Eng), cited in *Monarch Fine Foods Co v International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 647 (Gogna Grievance)*, (1978) 20 L.A.C. (2d) 419 (ON LA) (Picher) at para 8 [*Latter*]).

³ *Hamilton Health Sciences v Ontario Nurses' Assn. (Sick Leave Benefits Grievance)*, (2007) 16 LAC (4th) 122 (ON LA) (Surdykowski) [*HHS I Medical Form Grievance*].

Have privacy statutes made a difference? Are the acts being applied at all? How do arbitrators interpret these statutory provisions that severely limit the collection, use and disclosure of an medical evidence unless it meets the test of "reasonably necessary"? How are arbitrators interpreting common law privacy principles or the recent privacy tort "intrusion upon seclusion"?

Our review indicates that largely privacy statutes are ignored when it comes to workplace issues. In particular, it appears that arbitrators do not seem comfortable with applying the statutory privacy provisions and prefer to simply fall back on the language of 'balancing' individual privacy rights with the employer's business interests without regard to the statutory tests, restrictions and processes. This has significant implications for employee rights, as it results in impeding workers' access to the robust protections within the legislation.

II. Statutory Protections of Privacy

In Canada, at both the federal level and provincial level, privacy legislation was introduced within the last twenty five years. The oldest statute was introduced in 1983⁴ and the most recent piece of legislation was introduced in 2009.⁵

At the provincial level, Ontario, Manitoba, Saskatchewan, British Columbia (BC), Alberta, New Brunswick and Newfoundland and Labrador all possess privacy legislation that specifically addresses the privacy of health information.

(a) Federal Acts

At the federal level there are two privacy statutes: the *Privacy Act*⁶ and the *Personal Information Protection and Electronic Documents Act (PIPEDA)*.⁷ The *Privacy Act*,⁸ introduced in 1983, imposes privacy obligations on approximately 250 federal government departments and agencies by restricting of gathering, using and releasing of personal information.⁹ Personal information is defined in the *Act* as including:

information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,

⁴ *Privacy Act*, RSC, 1985, c. P-21 [*Privacy Act*].

⁵ *Right to Information and Protection of Privacy Act*, SNB 2009, c R-10.6 at s 4.

⁶ RSC 1985, c P-21.

⁷ SC 2000, c 5 [*PIPEDA*].

⁸ *Privacy Act*, supra note 4.

⁹ Office of the Privacy Commissioner of Canada, Factsheet: privacy Legislation in Canada," (Mar 2009), online: <http://www.priv.gc.ca/resource/fs-fi/02_05_d_15_e.asp>.

(a) information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual;

(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;

(c) any identifying number, symbol or other particular assigned to the individual;

(d) the address, fingerprints or blood type of the individual;

(e) the personal opinions or views of the individual except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual by a government institution or a part of a government institution specified in the regulations...¹⁰

PIPEDA came fully into force in 2004.¹¹ *PIPEDA* provides privacy rights that apply to private sector organizations, protecting individuals in terms of the information that is collected, used or disclosed in the course of commercial transactions.¹² *PIPEDA* also applies in the employment context to federally regulated employees (i.e. business that are engaged in federal works, undertakings and businesses).¹³

As British Columbia, Alberta, and Quebec have private sector privacy legislation that is deemed to be "substantially similar" to *PIPEDA*, *PIPEDA* does not apply in these jurisdictions.¹⁴ *PIPEDA* thus applies to the private sector in all other provinces and territories.¹⁵

¹⁰ *Privacy Act*, *supra* note 4 at s 3.

¹¹ *PIPEDA* contains a provision requiring its review every five years. The first review occurred in 2006 but its recommendations have not passed the Second Reading in Parliament. The Office of the Privacy Commissioner describes the second review of *PIPEDA* as "overdue." In 2012, the Standing Committee on Access to Information, Privacy and Ethics issued a report recommending changes to the legislation in terms of new technology. These changes have not yet been implemented. See, Office of the Privacy Commissioner of Canada, "The Case for Reforming the *Personal Information Protection and Electronic Documents Act*" (May 2013), online: <http://www.priv.gc.ca/parl/2013/pipeda_r_201305_e.asp>. See also, Parliament of Canada, "Legislative Summary of Bill C-29: An Act to amend the *Personal Information Protection and Electronic Documents Act*," online: <http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?Language=E&ls=c29&Parl=40&Ses=3&source=library_prb>.

¹² *PIPEDA*, *supra* note 7 at s 4(1)(a).

¹³ *Ibid* at s 4(1)(b).

¹⁴ *Ibid* at ss 4(3), 26(2)(b).

¹⁵ *Ibid* at ss 4(1)(a), 4(3).

In Ontario, health information is exempt from the application from *PIPEDA* given Ontario's *Personal Health Information Protection Act (PHIPA)*.¹⁶

(b) Provincial Statutory Regimes

Each province now has its own public sector privacy legislation. As discussed above, the *PIPEDA* applies to the private sector in all jurisdictions except in BC, Alberta and Quebec.

In addition, Ontario, Manitoba, Saskatchewan, BC, Alberta, New Brunswick and Newfoundland and Labrador all have health specific privacy legislation.

This paper focuses on outlining the statutory regimes in the provinces of Ontario, BC and Saskatchewan, as there is recent arbitral jurisprudence addressing privacy legislation from these jurisdictions and little or none in the other jurisdictions.¹⁷

i) Ontario

Ontario has by far the most complex statutory regime governing privacy relevant to the disclosure of medical information.

1) **The *Freedom of Information and Protection of Privacy Act (FIPPA)*** applies to the broader public sector,¹⁸ including universities and colleges, Local Health Integration Networks (LHINS) and provincial ministries, and most provincial boards, agencies and commissions.

2) **The *Municipal Freedom of Information and Protection of Privacy Act***

¹⁶ SO 2004, c 3 Sched A [*PHIPA*].

¹⁷ In **Alberta**, the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, provides protection in the public sector, the *Personal Information Protection Act*, SA 2003, c P-6.5 applies to the private sector and the *Health Information Act*, RSA 2000, is health specific privacy legislation. In **Manitoba**, the *Freedom of Information and Protection of Privacy Act*, CCSM c F175, applies to the public sector and the *Personal Health Information Act*, CCSM c P33.5. provides privacy protection for health information. In **Quebec**, there are two statutory schemes, and *An Act respecting Access to documents held by public bodies and the Protection of personal information*, RSQ c A-2.1 and *An Act respecting the protection of personal information in the private sector*, RSQ c P-39.1. In **Nova Scotia**, the *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, applies to the public sector. In **New Brunswick**, the *Right to Information and Protection of Privacy Act*, SNB 2009, c R-10.6, applies to the public sector and the *Personal Health Information Privacy and Access Act*, SNB 2009, c P-7.05 is health specific privacy legislation. In **Prince Edward Island**, the *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, applies to the public sector. In **Newfoundland and Labrador**, the *Access to Information and Protection of Privacy Act*, SNL 2002, c A-1.1 applies to the public sector and the *Personal Health Information Act*, SNL 2008, c P-7.01, applies to the use or disclosure of health information. **The Territories** are each covered by a respective statute entitled the *Access to Information and Protection of Privacy Act* (RSY 2002, c 1; SNWT 1994, c 20; SNWT (Nu) 1994, c 20), which applies to the public sector.

¹⁸ RSO 1990, c F.31 at s 1(1)(b).

(MFIPPA) applies to municipal bodies, school boards, police services boards and similar local government organizations.¹⁹

3) The **PHIPA**, introduced in 2004, is health specific privacy legislation which applies to "health information custodians" (HICs) in hospitals, long term care facilities and clinics as well as the Ministry of Health and Long-Term Care. It also to employers and insurance companies that receive personal health information from the health care system.

The **PHIPA** limits the "collection, use, and disclosure" of personal health information by "health information custodians" unless the health information custodian has the knowledgeable, informed and freely given consent of the individual *and* the collection, use or disclosure is "necessary for a lawful purpose."²⁰ Implied consent is permissible in limited circumstances, but is not permitted where the disclosure of the information is not for the purposes of providing health care (i.e. typically allowed in emergency health, but not in the employment setting).²¹

The collection, use, or disclosure of personal health information is further prohibited by health information custodians if other, non-confidential information "will serve the purpose of the collection, use or disclosure."²² The amount of information that is permissible to be collected, used or and disclosed is thus only what is "reasonably necessary" to fulfill its intended purpose.²³ These robust protections are accompanied by an enforcement scheme, in which there are major consequences for violations of **PHIPA**, including an ability to obtain monetary damages for breach of privacy.²⁴

4) **The Occupational Health and Safety Act (OHSA)**,²⁵ also provides in section 63(2), that "no employer shall seek to gain access, except by an order of the court or other tribunal or in order to comply with another statute, to a health record concerning a worker without the worker's written consent." Section 63(6) states that "[t]his section prevails despite anything to the contrary in the *Personal Health Information Protection Act, 2004*."²⁶

5) **The Mental Health Act**²⁷ also provides a regime protecting the disclosure of psychiatric records. Section 35 of the *Act* outlines a procedure regarding the

¹⁹ RSO 1990,c M.56 at ss 1-2 [*MFIPPA*].

²⁰ *Ibid* at ss 4, 18, 29 [emphasis added].

²¹ *Ibid* at ss 18(2)-(3).

²² *Ibid* at ss 30(1).

²³ *Ibid* at ss 30(2), 37(1)(a)-(b).

²⁴ *Ibid* at s 65(a).

²⁵ RSO 1990, c O.1 [*OHSA*].

²⁶ *Ibid* at s 63(6).

²⁷ RSO 1990, c M 7 at s 35 [*MHA*].

production and admissibility of the personal health information of "patients" created in relation to assessment, observation or treatment of a patient in a designated psychiatric facility in legal proceedings. "Patient" is defined broadly and includes "former patients, out-patients, former out-patients and anyone who is or has been detained in a designated psychiatric facility."²⁸ Section 35(5) governs a specific procedure for prehearing disclosure.²⁹ If the documents are proposed to be entered into evidence, section 35(9) states that the party seeking to do so must apply to Divisional Court.³⁰ As discussed below, this provision is largely ignored in labour arbitration, despite the fact that it should apply to many mental health records in this context. This is not entirely the fault of the arbitrators; employers and unions alike should be protecting these mental health records and following the required statutory procedure and rarely are.

6) **Profession Specific Acts** for health professionals regulated under the *Regulated Health Professions Act*³¹ also provide protection. Each profession in Ontario has a profession specific act and regulations governing the confidentiality of medical information by placing statutory duties to protect the confidentiality of patient medical records on health care providers. It is an act of professional misconduct for members of the regulated health professions to provide medical information about a patient/client without the consent of the client as required or allowed by law.³²

For instance, occupational health nurses who collect private health information about employees would be in breach of their professional regulations, and would put their license to practise as a Registered Nurse at risk, if they improperly disclosed medical information to employer's managers about employees without the employee's consent.

Similarly public institutions like hospitals have statutory duties to protect privacy of medical information from unauthorized access.³³

7) **The PIPEDA**, the federal legislation discussed above, applies to the private sector.³⁴

²⁸ *Ibid* at s 35(1).

²⁹ *Ibid* at s 35(5).

³⁰ *Ibid* at s 35(9).

³¹ 1991, SO 1991, c 18.

³² See, for example, s 1 (10) of the Regulation 799/93 under the *Nursing Act*, 1991, SO 1991, c 32. There are similar regulations and acts for all the other regulated health professionals.

³³ Public hospitals are under a statutory duty to protect medical records and materials pertaining to patient care from unauthorized access pursuant to reg 965, s 22, under the *Public Hospitals Act*, RSO 1990, c P.40.

³⁴ *PIPEDA*, *supra* note 7 at s 4(1)(a).

ii) *British Columbia*

In British Columbia, the public sector privacy legislation is the *Freedom of Information and Protection of Privacy Act (FOIPPA)*.³⁵ The *Personal Information Protection Act (PIPA)* applies to the private sector.³⁶ Finally, the *E-Health (Personal Health Information Access and Protection of Privacy) Act*,³⁷ is the only statute in Canada which addresses access and protection of electronic health information in government data banks.

iii) *Saskatchewan*

In the public sector, *The Freedom of Information and Protection of Privacy Act* applies to government institutions³⁸ and the *Local Authority Freedom of Information and Protection of Privacy Act* applies to municipal bodies.³⁹ The *PIPEDA* applies to the private sector.⁴⁰ Like Ontario, Saskatchewan also has health specific privacy legislation, the *Health and Information Protection Act (HIPA)*.⁴¹

III. Courts and Privacy

(a) **The Impact of *Jones v Tsige***

Much has been written and talked about regarding the 2012 Ontario Court of Appeal decision of *Jones v Tsige (Jones)*, which affirmed a "right to bring a civil action for damages for the invasion of personal privacy" in Ontario.⁴² For the first time in Canada, a court recognized a tort protecting privacy, which it entitled the tort of "intrusion from seclusion."⁴³

This case, despite its publicity, might be a flash in the pan. Although it may be too early to tell considering the significant amount of time for a case to make it to trial, few court or arbitration cases have followed *Jones* lead to date since its release almost two years ago. In the labour context, *Jones* does not seem to have impacted arbitral jurisprudence in any significant way. This is discussed further below, in section V(f), "Arbitrators Application of *Jones*."

³⁵ RSBC 1996 c 165 at s 3 [*FOIPPA*].

³⁶ SBC 2003 c 63 at ss 1-3.

³⁷ SBC 2008, c 38.

³⁸ SS 1990-91, c F-22.01 at s 5.

³⁹ SS 1990-91, c L-27.1 at ss 2(f), 5.

⁴⁰ *PIPEDA*, *supra* note 7 at s 4(1)(a).

⁴¹ SS 1999, c H-0.021.

⁴² 2012 ONCA 32 at para 1 [*Jones*].

⁴³ *Ibid* at para 89.

(b) The Common Law Right to Privacy in Canada

Courts have recognized a common law privacy long before the tort of "intrusion upon seclusion" was considered in Canada; this history of the common law principles are discussed at length in the *Jones* case itself.⁴⁴

This recognition of privacy includes the privacy of employee's medical information. In the 2005 Ontario Divisional Court case of the *Ontario Nurses' Association v St. Joseph's Health Centre (St. Joseph's)*,⁴⁵ the Court stated that "the doctor-patient relationship is among the most private in Canadian society."⁴⁶ The case involved the judicial review of an arbitrator's decision that ordered the grievor, a nurse, to submit to a psychological examination and provide the results to her employer hospital before she would be permitted to return to work.

The Court found that the care required "the application of common law principles relating to the balancing of privacy interests."⁴⁷ The Court stated:

While arbitrators have some experience in such matters, the court, at the least, shares such an expertise with the arbitrator, so that, relative to the court, the arbitrator has no advantage requiring deference to his views on the scope of the privacy right. As well, the scope of the privacy right is a question of law outside of the arbitrator's "home legislation" on which the decision must be correct.⁴⁸

The union, the Ontario Nurses' Association (ONA), was successful in overturning the arbitrator's referral of the nurse to a third party medical examiner on privacy grounds. The majority of the three judge panel found that the arbitrator erred in insisting on this intrusive process.⁴⁹ In the court's view, the arbitrator should have analysed the facts and articulated why the questions were still needed to be answered for the "the importance of the privacy principle required nothing less in order to achieve fairness to the grievor."⁵⁰ The second error was "the escalation of moving from the information as to the grievor's mental state be obtained from her own physician, into a much more intrusive third party examination."⁵¹

⁴⁴ *Ibid* at paras 15-46.

⁴⁵ 76 OR (3rd) 22 (Div Ct).

⁴⁶ *Ibid* at para 18.

⁴⁷ *Ibid* at para 15.

⁴⁸ *Ibid* at para 16.

⁴⁹ *Ibid* at paras 27-29.

⁵⁰ *Ibid* at para 26.

⁵¹ *Ibid* at paras 27-29.

This case was decided in 2006, two years after the introduction of *PHIPPA*, yet, there is no discussion of the statute. *St. Joseph's* illustrates that the nebulous common law principles of privacy applied by courts may embody a more rigorous approach to privacy than most arbitrators generally exhibit, even under the regime of express statutory privacy provisions.

IV. Privacy Commissioner Decisions

Under *PIPEDA*, employees have successfully challenged the requirement to provide a medical diagnosis on a doctor's certificate to obtain sick leave by complaining to the Privacy Commissioner.

For example, in a 2003 case, an employee, an office worker, complained that her employer, a transportation service company, required that the medical diagnosis be included on the doctor's certificate for sick leave. The certificate was to be given to the occupational health and safety advisor.

The employer argued that, in many cases, the doctor who provides the certificate is unfamiliar with the demands of the employee's position and that the occupational health and safety officers of the employer are in a better position to judge whether the employee can safely return to work.

The Canada Privacy Commissioner readily found that it was a breach of the statute ask for diagnosis in those circumstances. *PIPEDA* states that the information shall be limited to that which is "necessary." The Commissioner found that it was reasonable for an employer to request a medical certificate for sick leave when the leave exceeds the allowable number of absences without a certificate, but found the employer's form went too far in its required medical disclosure. She held:

However, the statement by the employee's doctor should have sufficed to confirm that the absence was justified. The organization was entitled to ask for and obtain a medical certificate, but it was not entitled to ask for details about the nature of the illness. This collection of information was abusive in as much as the employer did not prove that it was necessary.⁵²

Note that the Privacy Commissioner placed the onus on the employer to prove the medical information was "necessary." The employer failed to meet this onus, and the *collection* of information (let alone reliance on it or disclosure to others) was "abusive" as the employer did not establish necessity. The Commissioner felt that the statement of the employee's treating doctor should

⁵² [2003] CPCSF, *PIPEDA* Case Summary 233.

have sufficed; there is no assumption of bias as an "advocate" that is found in the arbitral jurisprudence.⁵³

This is not an isolated decision. In further decisions, even in "high risk, safety-sensitive positions," the Privacy Commissioner criticized the employer's decision requiring medical information beyond confirming they were sick. For instance, in a later decision that same year, she found it was not "necessary" to require employees to provide diagnostic information even in cases of "suspicious absences." The employer was in breach of *PIPEDA* for requiring the complainant employees to provide diagnosis.⁵⁴

The Commissioner went further and criticized the employer's policy, recommending that it to be changed in a number of systemic ways. She endorsed that the organization remove its requirement for mandatory inclusion of diagnosis and revisit all of its decisions to deny medical leave to individuals who refused to provide a medical diagnosis.

In Ontario, there are a number of cases where the Ontario Privacy Commissioner interprets the Ontario legislation using strong language and orders detailed remedies, although none to date appear to related to protecting an employee's privacy in the workplace.⁵⁵ An example of the type of remedies that she imposes on institutions can be illustrated in a case where a patient's personal health information held by a hospital was accessed by an employee, a Diagnostic Imaging Technologist, who was not providing care to the particular patient.⁵⁶ The hospital was ordered:

- to review and revise its policies, procedures and information practices relating to personal health information to ensure that they comply with the requirements of the *Act* and its regulations;
- to amend its Process for Investigating Privacy Breaches and/or Complaints to add a provision requiring an agent who has contravened the *Act* to sign a confidentiality undertaking and non-disclosure agreement;
- to provide a written report of the privacy breach and a copy of this Order to the technologist's professional college;
- to issue a communiqué to all agents regarding Order HO-002 and the findings and order provisions contained in Order HO-010, which must include a message that the hospital views breaches of this nature seriously, that action will be taken to discipline agents who are found to have breached the *Act*, and

⁵³ *Ibid.*

⁵⁴ [2003] CPCSF 14145, *PIPEDA* Case Summary 257.

⁵⁵ The Ontario Information Privacy Commissioner (IPC) decisions under *PHIPPA*, *MFFIPA* and *FIPPA* are found online at <<http://www.ipc.on.ca>>.

⁵⁶ IPC Decision HC10-52, online: <<http://www.ipc.on.ca>>.

- that their professional regulatory college will be provided written reports setting out the circumstances of the breach;
- to include a discussion of Order HO-002 and Order HO-010 in all future training programs;
 - to conduct privacy retraining for all agents in the technologist's department, as required by the hospital's policy;
 - to amend its written public statement to include a description of the "VIP Warning Flag" system, to indicate how an individual may request one and to identify the employee(s) of the hospital to whom the request may be directed;
 - to ensure that the "VIP Warning Flag" may be applied in all electronic information systems that include personal health information;
 - to implement a notice that automatically displays whenever an agent logs into a database containing records of personal health information and reminds them that they may only access personal health information on a need-to-know basis, that access will be tracked, and that failure to comply may result in termination.

The Order further recommended that the hospital:

- conduct a review of existing technological safeguards and solutions that are currently available on the market to facilitate role-based access and audit;
- conduct a review of existing technological safeguards and solutions that are currently available on the market to facilitate role-based access and audit; and,
- review the audit functionality on all systems employed at the hospital and take steps to ensure that the audit capability is "turned on."

This extremely stringent approach to privacy enforcement is not reflected in arbitration cases dealing with the privacy rights of employees in the workplace, which we will now explore.

V. Arbitrators' Understandings of Privacy and Privacy Legislation

Arbitrations deal with a plethora of grievance dealing with medical issues—ranging from sick leave benefits administration, return to work issues, accommodation issues, drug screening, management of absenteeism programs to determining just cause for discipline. These cases all involve a necessary review of what medical evidence should be produced and/or admitted and thus how to protect the privacy of employees with respect to their confidential medical information.

This suggests that arbitrators' decisions should involve careful analysis of the robust protections of privacy in the respective statutory schemes. Yet, as we discuss below, a review of arbitral decisions from 2008-2013 in Ontario, British Columbia and Saskatchewan suggests that arbitrators are failing to apply, and often recognize, these statutory schemes.⁵⁷ This is highly troubling as it suggests these legislative rights may not be accessible to workers.

(a) Prehearing Production

Arbitrators have broad powers to produce documents. For instance, the Ontario *Labour Relations Act* gives arbitrators the power to "require any party to produce documents or things that may be relevant to the matter and to do so before or during the hearing."⁵⁸

*West Park Hospital and ONA*⁵⁹ is still a leading case regarding the disclosure of medical records at arbitration. While the employer's request for pre-hearing production was not given, the decision sets out a five-fold test when it comes to disclosure orders for medical information:

1. The information requested must be "arguably relevant;"
2. The request must be particularized so there is no dispute as to what is requested;
3. The board should be satisfied that the information is not being requested as a "fishing expedition;"
4. There must be a nexus between the information requested and the position in dispute; and,
5. The board should be satisfied that the disclosure will not cause undue prejudice.⁶⁰

This 1993 test has not been updated to include privacy legislation principles requiring an assessment of whether the medical information is "necessary" before it can be collected, used or disclosed in any way. "Necessary" is a much more stringent test than "arguably relevant," yet we could find no prehearing disclosure decisions setting out a new test in this post privacy legislation era.

⁵⁷ Indeed, the reason our analysis focuses on only these three provincial jurisdictions is because there was no case law from 2008-2013 that mentioned the applicable provincial statute in the context of the disclosure of medical records.

⁵⁸ *Labour Relations Act*, 1995, SO 1995, c 1, Sch A at s 48(12)(b).

⁵⁹ (1993) 37 LAC (4th) 160 (Knopf).

⁶⁰ *Ibid* at 167.

(b) Medical Records Generally

Most arbitrators take the position that if a grievance raises an issue arguably relevant to the grievor's medical status, the medical documents will be ordered to be produced and introduced in evidence. In practice, there is little thought given to privacy principles at the hearing. Few arbitrators consider statutory privacy provisions or the common law privacy principles when it comes to production, although they might consider it at the time admissibility of the evidence in the hearing. If privacy rights are considered, the general view appears to be that the grievor has waived their privacy right by bringing the grievance or raising a medical issue. The privacy principles, however, are clear that the legal protections apply to the collection, use or disclosure of personal medical information.

In an early case from 1996, *Canada Post and CUPW (Ellis)*,⁶¹ which addresses the discharge of an employee for theft, the union argued that the grievor suffered from a mental condition that impacted her judgement at the time of the theft. The employer wanted the grievor to be examined by a psychiatrist of their choice. The union objected, arguing that such a requirement breached the employee's fundamental right to privacy. This was a 1996 case and the union had only common law principles to rely on.

Arbitrator Devlin held that the union put the mental condition of the grievor in issue. She further held that the right to a fair hearing takes precedence over the grievor's privacy. She also noted that there had been significant discourse of the grievor's personal circumstances as a result of the evidence of the grievor's psychiatrist.

The decision in this case was upheld on judicial review.⁶² In its endorsement, the Ontario Divisional court upheld Arbitrator Devlin's reasoning on all points. The Court held that since the union put the grievor's mental condition in issue, the employee waived her privacy rights. There was no discussion of the privacy statutes, as the case was in 1997 and prior to their introduction, although the 1990 *Mental Health Act* was in place at the time.

On the facts of this case, it may be understandable that the grievor was considered to "waive" her privacy rights. However, this same principle of waiver is routinely applied in most cases concerning the disclosure of medical information – i.e. where a grievor wants to return to work, obtain benefits or be accommodated. It is not unusual for an arbitrator to simply ascertain that there is a possible medical issue raised by either party and then order the production of medical documents. At that point, privacy simply goes out the window and rarely is there discussion of privacy statutes or principles.

⁶¹ [1996] CLAD 980 (Devlin).

⁶² [1997] OJ 5302 (Div Ct).

While occasionally arbitrators put conditions on the release of the information, such as limitations on who at the employer's workplace can review confidential documents, that is not the norm. Instead, the principle of whether it is "necessary" to collect, use, store or how to dispose of confidential health information is rarely considered by arbitrators, despite this specification in the legislative scheme.

(c) The Production of Mental Health Records

Most troubling is the lax regard to production and use of medical documentation regarding mental health information. Few Ontario arbitrators (or the parties before them) turn their mind to the strict requirements of the Ontario *Mental Health Act*.

At best, only some arbitrators refer to a standard that is more rigorous than the disclosure of information that is "arguably relevant." For instance, one arbitrator noted that the obligation to produce mental health records and to submit to a psychiatrist examination are "*prima facie* highly intrusive" and, as such, should be subject to a different standards because of the highly sensitive nature of that information.⁶³ As discussed below, there is a history of arbitrators recognizing that ordering employees to complete a medical or psychiatric exams is a remedy that should be used sparingly. However, there is rarely a recognition that the production of mental health records alone is "*prima facie* highly intrusive."

As indicated above, the provisions of Ontario's *Mental Health Act* under section 35(5) govern a specific procedure for prehearing disclosure. Further, the statute also requires that if the documents are proposed to be entered into evidence, the party seeking to do so must apply to Divisional Court. Yet many, and we believe most, mental health records that should be covered by these protections are entered into evidence with no regard for these statutory requirements.

In *Toronto Police Association v Toronto Police Services Board*,⁶⁴ the Ontario Divisional Court judicially reviewed an arbitral decision concerning an employer's request for the disclosure of a grievor's psychiatric assessment.⁶⁵ Arbitrator Shime ruled that section 35(5) of the *Mental Health Act* allowed for arbitrators to compel production of medical records that did not require an application to the Divisional Court.⁶⁶ The Court agreed, ruling that sections 35(5) to 35(7) address pre-hearing production and do not require an application to the Court, but that section 35(9) applies to admitting medical records into evidence in arbitration, which requires a court order.⁶⁷

⁶³ *Oliver Paigoonge and LIUNA, Local 607*, (1999) 79 LAC (4th) 241 (Whitaker).

⁶⁴ [2008] OJ 4380 [*Toronto Police*].

⁶⁵ *Ibid* at paras 1, 13.

⁶⁶ *Ibid* at para 14.

⁶⁷ *Ibid* at paras 46, 49. See, ss 35 (5)-(9) of the *Mental Health Act*, *supra* note 27.

The Court clarified that under section 35(5), a party seeking pre-hearing production of mental health records must serve a summons for the production of the records on the "officer in charge of a mental health facility or his/her delegate," which requires that production be made to the decision-maker only. If the attending physician does not give notice of any concerns of harm stemming from the disclosure, the decision-maker may examine the record to determine the relevance of the records, weighing their probative value with the individual's right to privacy, to assess if production should be ordered. Where a party then seeks seeking to adduce the mental health record into evidence, the party must apply to Court. The Court then assesses if the produced record should be admitted into evidence if it is "essential in the interests of justice."⁶⁸

Toronto Police remains the leading case on the disclosure of psychiatric records. We could not locate any arbitral cases within the last five years that engaged the procedure under the *Mental Health Act* regarding the production and admission of psychiatric records into evidence. This is not because the procedure under the *Mental Health Act* is subsumed by *PHIPA*. Instead, the *Mental Health Act* explicitly states that in cases of conflict with *PHIPA*, the provisions of the *Mental Health Act* prevail.⁶⁹ And it is not of course because there has been no cases where mental health records are at issue in arbitrations; in a range of cases dealing with short and long term sick benefits, defences to discipline, accommodation issues, and return to work issues, to name just a few situations, such records are routinely admitted. This suggests that parties and arbitrators are not following the procedure under the *Mental Health Act*, which raises serious concerns in terms of gaps in privacy rights.

(d) Requiring an Examination by a Physician

In a case that is now half a century old, the 1963 case of an Ontario court in *Re Thompson and Town of Oakville*,⁷⁰ the court stated that the employer only had a right to require its employees to submit to a medical examination if such rights had been negotiated into the collective agreement. It is not implied. The court stated:

The right of employers to order their employees to submit to an examination by a doctor of the choice of the employer must dependent either on contractual obligation or statutory authority.⁷¹

There is the long establish principle of common law that without consent an examination by a doctor may amount to trespass or assault upon the person.

⁶⁸ *Ibid.*

⁶⁹ *MHA*, *supra* note 27 at s 34.1.

⁷⁰ (1963) 41 DLR (2d) 294 (Ont High Court).

⁷¹ *Ibid* at para 18.

Most Canadian arbitrators are sensitive to the intrusive nature of requiring employees to submit to a medical examination. Even where there is express language in a collective agreement, arbitrators often note the symbolic implications of this requirement in terms of individual rights to privacy. Some arbitrators say medical examinations must be resorted to "in the rare cases."⁷² Arbitrators have never felt the need to rely on statutory privacy legislation if they are inclined to recognize the intrusive nature of third party examinations.

However, not all employers seem to recognize that they must negotiate this language regarding medical examinations into the collective agreement. Further, even with this language in an agreement, the requirement of a medical examination should be used sparingly or as a "last resort," as stated in the jurisprudence.

The physician of the choice of the employer is often erroneously referred to as providing an "independent" medical opinion, despite the fact they are retained by the employer and the union and the employee usually have no choice as to the doctor, the information given, or the questions posed.

To date, arbitrators rarely apply the privacy statutes in considering such issues, but make general reference to the contract language, or, at best "reasonableness" and "balancing" rights (when, in fact, the employee has a privacy "right," there is no corresponding employer "right").

The Divisional Court decision in *St. Joseph's Health Care* referred to above in section III(b) "Courts and Privacy," is an example of the court overturning an arbitrator's referral of an employee to the intrusive process of a third party physician's examination, where the arbitrator failed to sufficiently recognize the invasion of the employee's privacy rights.

One would have thought that now, with specific legislation recognizing that an employer cannot even "collect" medical information from an employee's own physician without meeting the test of "necessity," that there would be a much higher onus on an employer to justify collecting medical information after an examination by a doctor who is a stranger to the employee. Unfortunately, the case law does not bear out that there is a new heightened need to justify such processes.

(e) Arbitrator's Application of Privacy Statutes

Despite the fact privacy legislation has now been in place for significant number of years, some back to 1990, the jurisprudence indicates that there is a scarcity of arbitration decisions applying or even referring to privacy legislation. As in the early years of applying human rights codes, arbitrators do not seem

⁷² For example, *NAV Canada and the Canadian Air Traffic Control Association*, (1998) 74 LAC (4th) 163 (CA LA) (Swan) or the BC case, *Pope and Talbot Ltd and I.W.A. Canada Loc 1-423*, (1996) 57 LAC (4th) 63 (Taylor).

comfortable with applying the statutory privacy provisions and prefer to fall back on the language of 'balancing' the privacy rights and business interests. The statutes have no such balancing tests; they set out the high standard of only collecting, using or disclosing information that is reasonably "necessary."

Our analysis of the cases applying privacy legislation is divided into policy grievances, which address the level of required medical disclosure on medical forms, and individual grievances, some of which address if the disclosure of diagnosis is required to access sick leave or accommodation for a disability. In both policy and individual grievances, the most comprehensive analysis of provincial privacy legislation is found in the Ontario jurisprudence. Within our five year review, we could not locate cases from other provinces or territories which referenced privacy legislation.

i) The Medical Form Cases

ONA raised a series of challenges regarding medical privacy issues when Hamilton Health Sciences (HHS) contracted out its administration of the Hospital's sick leave plan adjudication and medical case management to a third party agent, Cowan Wright Beauchamp (Cowan). The policy grievances were litigated in phases resulting in a series of decisions, two of which became key arbitral decisions on privacy issues regarding medical information in the workplace.

The first decision, *Hamilton Health Sciences v Ontario Nurses' Assn. (Sick Leave Benefits Grievance) (HHS I Medical Form Grievance)*,⁷³ dealt with the medical information asked of employees on forms (the Medical Certificate of Disability Form that the hospital and its agent were requiring employees to have their physicians fill out to access the negotiated sick short term sick leave benefits).

The second decision, *Hamilton Health Sciences and ONA (HHS II Sick Leave Benefits Plan Grievance)*⁷⁴ dealt with ONA's allegations that Cowan was administering the short term disability (STD) benefits program in a way that systemically violated the collective agreement, privacy statutes and the *Ontario Human Rights Code*. ONA further argued that Cowan harassed employees who applied for sick leave benefits and improperly handled employees' confidential medical information.

These serious allegations were found to be substantiated by Arbitrator Surdykowski.⁷⁵ He ruled that the employer, through its agent Cowan who was described as standing "in the shoes of the employer," violated the collective

⁷³ *Supra* note 3.

⁷⁴ *ONA and Hamilton Health Sciences* (2008) 93 CLAS 224 (ON LA) (Surdykowski) [*HHS II Sick Leave Benefits Plan Grievance*].

⁷⁵ *Ibid* at paras 131, 133.

agreement by "applying the wrong test for entitlement to short term disability benefits," "considering irrelevant factors when determining entitlement to short term disability benefits" and acted in a manner that is:

arbitrary, harassing, coercive and in bad faith by seeking to deflect bargaining unit employees away from their right to sick leave benefits under the collective agreement by suggesting that they seek assistance other than short term disability benefits under the collective agreement, by ignoring or misapplying relevant medical information and generally accepted guidelines, by contacting employees' physician's directly without first obtaining an appropriate consent or keeping employees properly informed in that respect, and by pursuing the return to work of bargaining unit employees prematurely and without proper attention to the relevant circumstances.⁷⁶

Arbitrator Surdykowski subsequently ordered that the employer and Cowan cease and desist from this improper conduct, and that "employees' claims for short term disability benefits be assessed and adjudicated in accordance with all the Awards issued in this proceeding."⁷⁷

In the first decision, *HHS I Medical Form Grievance*, Arbitrator Surdykowski was asked to assess policy grievances in which ONA alleged that the application form for short term sick leave benefits required an improper scope of disclosure of personal health information.⁷⁸ ONA alleged breaches of the Ontario's *PHIPA* and *OHSA*,⁷⁹ both discussed above in section II(b), "Statutory Protections of Privacy."

ONA argued that the consent form was coercive, as employees were told they must sign the form and provide all of the information requested or they would be denied benefits.⁸⁰ Notably, the *PHIPPA* prohibits coerced consent.⁸¹ ONA further argued that the form was too broad, as it required the disclosure of diagnosis, descriptions of symptoms and treatment plans.⁸² The diagnosis portion of this decision is discussed below in section V(e) iii), "Diagnosis Cases and the Current Issue of Nature of a Condition: A Distinction Without A Difference?."

⁷⁶ *Ibid* at para 157.

⁷⁷ *Ibid*.

⁷⁸ *HHS I Medical Form Grievance*, *supra* note 3 at paras 6-7.

⁷⁹ *Ibid* at paras 6, 21.

⁸⁰ *Ibid* at paras 6-7.

⁸¹ *PHIPA*, *supra* note 16 at s 18(1).

⁸² *HHS I Medical Form Grievance*, *supra* note 3 at paras 7, 17.

Arbitrator Surdykowski in the *ONA and HHS I Medical Form Grievance* states he views privacy rights as human rights encapsulated in privacy specific legislation.⁸³ He notes that the privacy rights in *PHIPA* or *OHSAA*, like human rights, are matters that "the parties cannot contract out of."⁸⁴ *PHIPA* is described by Arbitrator Surdykowski as embodying:

the modern approach to the issue [of privacy] and emphasizes the individual employee right to keep confidential medical information private except where it is absolutely necessary to disclose it. The *PHIPA* makes it clear that the individual's freely given (i.e. uncoerced) express or implied informed consent regarding specific personal health information must be obtained before any such information can be collected used or disclosed (section 18) and that personal health information shall only be collected, used or disclosed to the extent reasonably necessary to serve the particular purpose (sections 30 and 37).⁸⁵

Arbitrator Surdykowski then affirms the 'balancing' approach found in other arbitral jurisprudence, noting that the scope of confidential information required to be disclosed is that which:

is sufficiently reliable information to satisfy a reasonable objective employer that the employee was in fact absent from work due to illness or injury, and to any benefits claimed [citations omitted]... As a general matter, *the least intrusive non-punitive interpretive approach that balances the legitimate business interests of the employer and the privacy interests of the employee is appropriate. But what the employer is entitled to, and concomitantly what the employee is required to provide, will first and foremost depend on what the collective agreement or legislation provide in that respect.*⁸⁶

This suggests that arbitral review of employer requirements for disclosure should first assess the statutory scheme and collective agreement. Secondly, arbitral analysis then requires a balancing of the employer and individual interests. Yet, if the statutory protections are more robust, i.e., if they *only* reference the disclosure of what is reasonably "necessary," this second stage of analysis undermines employee rights for the sake of 'balancing' the employer's business interests, which, are an arbitral creation that lack a statutory basis. This 'balancing' approach thus potentially frustrates the legislature's intent regarding the safeguarding of individual privacy. Moreover, the legislature has already built in balance to the statutory test through a reasonableness standard

⁸³ *Ibid* at para 20.

⁸⁴ *Ibid* at para 22.

⁸⁵ *Ibid* at para 49.

⁸⁶ *Ibid* at para 25 [emphasis added].

– for example, in Ontario it is what is "reasonably necessary" for the intended purpose.

Arbitrator Surdykowski does not recognize this potential inconsistency. However, in applying *PHIPA*, he finds that the form used by the employer and its agent are improper as it requires that employees consent to the release of private personal medical information in excess of what the hospital or its agent is entitled to in the initial application for STD benefits and return to work purposes.⁸⁷ Arbitrator Surdykowski therefore orders that the use of the form cease.⁸⁸

In *Society of Energy Professionals v Ontario Power Generation (MAR Grievance) (Society MAR Grievance)*,⁸⁹ Arbitrator Etherington evaluates the Ontario Power Generation's (OPG) Medical Absence Report (MAR), which is similar to the form in *HHS I Medical Form Grievance*, as it requires the disclosure of diagnosis, medication and treatment plans in order access sick leave benefits. The union, the Society of Energy Professions (the Society) argued the MAR violated the collective agreement, arbitral principles and privacy and human rights legislation.

Arbitrator Etherington summarizes the jurisprudence on the topic of disclosure of medical information, stating that it reveals a "proportionality principle" which balances interests both "privacy and business concerns," such that:

the higher the degree of intrusiveness and interference with privacy that results from the employer policy, the more the employer will be called upon to demonstrate the importance of the business interest that would be threatened or lost without the policy.⁹⁰

Arbitrator Etherington ruled that employers have no right to employees' health information unless the collective agreement specifically grants a right to obtain such information and the employee consents.⁹¹ Many employers, including the OPG in this case, assumed they had a general right to obtain the information and need not have to bargain specific language. As applied to the case, the collective agreement did not provide a right to information such as diagnosis, or "information concerning 'underlying or other relevant medical conditions.'"⁹² Instead, the employer is only entitled to "sufficient medical information" to

⁸⁷ *HHS I Medical Form Grievance*, *supra* note 3 at paras 58, 70.

⁸⁸ *Ibid* para 70.

⁸⁹ [2009] OLAA 348 (Etherington) [*Society MAR Grievance*].

⁹⁰ *Ibid*.

⁹¹ *Ibid* at para 27.

⁹² *Ibid* at paras 99, 103.

establish that "their absence from work is due to illness or injury that prevents them from reporting to work."⁹³

Arbitrator Etherington adopts Arbitrator Surdykowski's classification of *PHIPA* in *HHS I Medical Form Grievance* as "comprehensive" legislation.⁹⁴ He then provides analysis of specific provisions of *PHIPA*. For example, Arbitrator Etherington interprets the requirement of "knowledgeable" consent regarding the release of medical information in section 29 of *PHIPA* as specifying that an employee "has to know the information they are consenting to disclosing and it cannot be an open ended consent to future communications with her physician."⁹⁵ This is important as many employers ask employees improperly for blanket and open ended consents.

Further, in applying a "purposive interpretation" of sections 30(2) and 37(1) of *PHIPA* which restrict the collection and disclosure of health information to what is "reasonably necessary," the employer is barred from using the MAR to collect more information than what is required to establish that an employee is unable to attend work.⁹⁶

In turn, Arbitrator Etherington affirms that *PHIPA* also prohibits the disclosure of diagnosis for sick leave, as it is not required to establish entitlement to this benefit.⁹⁷ However, the employer retains a right to request further information to address accommodation issues or where there are lengthier sick leave absences.⁹⁸ The MAR requirements of OPG were thus ruled to be inconsistent with the *PHIPA*, as they are too broad in scope.⁹⁹

The Society of Energy Professionals MAR Grievance embodies an example of an arbitrator applying the provisions of *PHIPA* to employer policy on disclosure. In so doing, Arbitrator Etherington engages in interpretation of the statutory scheme and provides a rationale in highlighting how the employer's request for disclosure fails to accord with the robust protections in *PHIPA*. *The Society of Energy Professionals MAR Grievance* thus represents the most comprehensive

⁹³ *Ibid* at para 99.

⁹⁴ *Ibid* at para 111; *HHS I Medical Form Grievance*, *supra* note 3 at paras 49-50.

⁹⁵ *Society MAR Grievance*, *supra* note 89 at para 112.

⁹⁶ *Ibid* at para 113.

⁹⁷ Arbitrator Etherington noted that although the *PIPEDA* applies to some Ontario Power Generation employees who are under federal jurisdiction, as the privacy protections in the *PIPEDA* are consistent with *PHIPA*, information such as diagnosis would also be barred from being disclosed to the employer. As such, the case was decided solely on the *PHIPA*. See, *ibid* at paras 113, 117.

⁹⁸ *Ibid* at para 113.

⁹⁹ *Ibid* at para 119.

engagement with *PHIPA* by an arbitrator and provides insight into the meaning and operation of the statute.

In *Insurance Corp of British Columbia v Canadian Office and Professional Employees' Union Local 378 (Short Term Disability Form Grievance) (Insurance Corp)*,¹⁰⁰ Arbitrator Burke refused to apply BC's *FOIPPA*, the province's public sector privacy legislation.¹⁰¹ This policy grievance involved a challenge to the employer's Occupational Health Fitness Assessment Form, which was applicable to all employees applying for short term sick leave.¹⁰² The union argued that the required scope of medical information breached the collective agreement and the statutory rights in *FOIPPA*.¹⁰³

In ruling that it was unnecessary to evaluate the union's argument regarding *FOIPPA*, Arbitrator Burke noted that the employer's form was of the standard variety found in BC and felt that it was generally reasonable in its request for disclosure.¹⁰⁴ Arbitrator Burke also stated that arbitral jurisprudence in BC allows for the employer to require:

Routine requests for medical information are limited to information which reasonably necessary for the administration sick leave benefits [citations omitted]...The focus is on information necessary to assist management in determining whether the illness or disability is *bona fide* and what impact it will have on the presence and attendance of the employee.¹⁰⁵

As the employer required medical information at "the lowest level," Arbitrator Burke stated that the employer was not precluded "from requesting more information should that be required in the circumstances."¹⁰⁶

However, Arbitrator Burke also ruled that the employer must modify its form so that the only information required to be disclosed is that which is "reasonably necessary" to administer the short term sick leave plan. Accordingly, the employer was ordered to amend the form, so that they could not require the disclosure of the "objective findings" of medical visits, details concerning treatment or the speciality of the employee's treating physician.¹⁰⁷

¹⁰⁰ [2010] BCCA 22 (Burke) [*Insurance Corp*].

¹⁰¹ *Ibid* at para 78.

¹⁰² *Ibid* at paras 1, 75, 77-78.

¹⁰³ *Ibid*.

¹⁰⁴ *Ibid* at paras 75,77. BC jurisprudence regarding diagnosis is different than in Ontario, where it is almost universally seen as too intrusive to ask for diagnosis any blanket way or at "the first instance."

¹⁰⁵ *Ibid* at para 75.

¹⁰⁶ *Ibid* at para 78.

¹⁰⁷ *Ibid* at para 124.

Insurance Corp suggests that arbitrators in BC do not commonly look to the statutory protections of privacy where the scope of medical information required to be disclosed can be ruled on arbitral principles alone. However, as Arbitrator Burke failed to assess the statute, it is unclear if the legislation would provide more robust protections than the standard of what is "reasonably necessary" from the BC jurisprudence.

Yet, the 2006 case of *Health Employers Association of British Columbia v British Columbia Nurses' Union (BC Health Employers)*,¹⁰⁸ although beyond the scope of our five-year review, is of note due to Arbitrator Hickling's affirmation of privacy rights in various statutory regimes. This case is referred to extensively by Arbitrator Burke in *Insurance Corp*,¹⁰⁹ however, as Arbitrator Burke refuses to decide the grievance on the privacy legislation, Arbitrator Hickling's affirmation of statutory privacy rights in *BC Health Employers* is overlooked.

BC Health Employers involved a policy grievance in which the union challenged the scope of medical information required to be disclosed in an attendance program, which was mandatory for employees absent from work due to illness or disability.¹¹⁰ Arbitrator Hickling assessed if the required level of disclosure was reasonable in terms of the statutory protections of privacy, including the federal statutes of the *Privacy Act* and *PIPEDA*, as well as BC's *FOIPPA* and *PIPA*.¹¹¹ In so doing, Arbitrator Hickling describes reasonableness as a multi factor inquiry which balances the business interests of the employer with the individual privacy rights of the employee.¹¹²

Arbitrator Hickling characterizes *PIPEDA* as creating a model of disclosure, use and collection of information which is limited by what is "reasonably required."¹¹³ Similarly, the provincial *FOIPPA* is also characterized as creating a scheme of disclosure on a "need to know basis."¹¹⁴ The provincial statute, *PIPA*, is described as the most relevant to the case at bar, as it governs the collection, use and disclosure of personal information by private organizations.¹¹⁵ It too is governed by a standard of reasonableness.¹¹⁶

¹⁰⁸ (2006), 86 CLAS 332 (BC LA) (Hickling) [*BC Health Employers*].

¹⁰⁹ *Supra* note 100 at paras 64, 74-74, 76, 83-85, 88, 90, 96, 117.

¹¹⁰ *BC Health Employers*, *supra* note 108 at paras 2-5.

¹¹¹ *Ibid* at paras 1, 69-79.

¹¹² *Ibid* at para 40.

¹¹³ *Ibid* at para 69.

¹¹⁴ *Ibid* at para 71.

¹¹⁵ *Ibid* at para 72; *PIPA*, *supra* note 36 at ss 1-3.

¹¹⁶ *BC Health Employers*, *supra* note 108 at para 73; *PIPA*, *supra* note 36 at s 4(1).

Although this case provides an overview of statutory rights, it is ultimately decided on the basis of the collective agreement.¹¹⁷ Applying arbitral jurisprudence, Arbitrator Hickling rules that although the form is "compatible" with the attendance program, it violates the procedures in the collective agreement, in which the employer has contracted out the rehabilitation of disabled employees to a third party insurer.¹¹⁸ Accordingly, it is reasonable for the employer to require employees to disclose the general nature of the current illness.¹¹⁹ However, necessitating the disclosure of diagnosis, origins or history of recurrence of an illness is unreasonable, as the focus in assessing eligibility for sick leave centres on how the current illness manifests to impede the employee from attending work.¹²⁰ Consequently, inquiring as to the employee's future absence and length of recovery is an inappropriate question asked on "a routine basis" at the initial stage of employees' application for temporary sick leave.¹²¹

Turning to Saskatchewan, in *Communications, Energy and Paperworkers Union of Canada, Local 1-S v SaskTel (Casual Sick Leave Grievance) (SaskTel)*,¹²² Arbitrator Pelton briefly refers to Saskatchewan's *HIPA* the province's health specific legislation.¹²³ *SaskTel* involved two policy grievances brought by the union.¹²⁴ The first challenged the employer's use of a MAR for casual sick leave and the second challenged the use of medical forms by the employer's third party insurer.¹²⁵ The MAR required disclosure of the nature of the illness and the employee's treatment plan.¹²⁶ Arbitrator Pelton noted that the *HIPA* applies to the employer's use of personal health information.¹²⁷ No further analysis of the *HIPA* is provided.

Arbitrator Pelton then reviews arbitral jurisprudence across Canada, including *HHS I Medical Form Grievance* and finds that the case law states that the employer's further requests for information must meet a test of "reasonableness," which is assessed contextually, and balances individual

¹¹⁷ *BC Health Employers*, *supra* note 108 at paras 182, 194.

¹¹⁸ *Ibid* at para 194.

¹¹⁹ *Ibid* at paras 115, 196.

¹²⁰ *Ibid* at para 86, 115, 196.

¹²¹ *Ibid* at paras 143, 148, 198.

¹²² (2011) 211 LAC (4th) 387 (SA LA) (Pelton) [*SaskTel*].

¹²³ *Ibid* at para 93.

¹²⁴ *Ibid* at para 93.

¹²⁵ *Ibid* at paras 2-3. NB: As this paper is assessing what is required to be disclosed to the employer, our analysis only involves the ruling on the MAR.

¹²⁶ *Ibid* at para 43.

¹²⁷ *Ibid* at para 93.

privacy interests versus the "employer's legitimate business interests."¹²⁸ In his view, the jurisprudence suggests that it is reasonable to require confirmation of illness (including the nature of the illness, but not the diagnosis), if a doctor was seen, if treatment was recommended and if it is being followed.¹²⁹

As applied to the case, Arbitrator Pelton found that what the employer required to obtain sick leave benefits on the MAR was too broad.¹³⁰ The employer was thus required to modify its requirements for disclosure.¹³¹ Specifically, the employer did not have a right to know when the employee first saw their doctor for treatment of the illness and the details of the employee's treatment plan.¹³² In contrast to *The Society of Energy Professionals MAR Grievance*, this ruling is made with only brief reference to the applicable health specific privacy legislation.

ii) *Individual Grievances Involving Analysis of Statutory Privacy Rights*

In *Ivaco Rolling Mills 2004 LP and U.S.W., Local 7940 (Charbonneau) (Re)*¹³³ Arbitrator Reilly assessed a return to work grievance of an individual suffering from bipolar disorder, whose diagnosis was previously disclosed. The employer contested the grievor's return to work based on safety concerns as there were contradictory medical reports.

In ordering a third psychiatric evaluation to assess if the grievor was fit to return to work, Arbitrator Reilly notes that the employer's right to medical information regarding ensuring safety in the workplace "must be balanced by the adjudicator and the result should respect the principal of natural justice, common sense and fairness and the right to individual privacy."¹³⁴ This right to privacy is described as "substantive" and protected by *PHIPA*, which "serves to prohibit an employer from interfering with an employee's privacy in matters of personal medical evidence."¹³⁵ However, no framework or further elucidation on the application of *PHIPA* was provided in this case.

In *Ottawa-Carleton District School Board and ETFO (Cairnie Grievance)*,¹³⁶ the grievor alleged that the respondent School Board failed to accommodate her

¹²⁸ *Ibid* at paras 94-95, 97-98, 106.

¹²⁹ *Ibid* at para 109.

¹³⁰ *Ibid* at para 158.

¹³¹ *Ibid*.

¹³² *Ibid* at paras 122-23, 126.

¹³³ 2008 CLB 7832 (ON LA) (Reilly).

¹³⁴ *Ibid*.

¹³⁵ *Ibid*.

¹³⁶ 2011 CLB 37649 (ON LA) (Brown).

temporary disability and acquired her medical information without her consent.¹³⁷ In regards to the release of medical information, the union based its claim in a violation of section 29 of Ontario's *MFIPPA*, as well as provisions of the *PHIPA* and *OHSA*.¹³⁸

Arbitrator Brown decides the matter solely based on the section 29 of *MFIPPA*. Noting that the definition of personal information in the *MFIPPA* includes medical history, Arbitrator Brown finds that the employer's request to the grievor's physician regarding a "medical reason" that she could not conduct her regular job duties resulted in the receipt of medical information, which constituted a violation of the *MFIPPA*.¹³⁹ The arbitrator order human rights damages of \$500 for injury to her dignity, feelings and self-respect for the disclosure of her personal information.¹⁴⁰

iii) *Diagnosis Cases and the Current Issue of Nature of a Condition: A Distinction Without a Difference?*

Ontario arbitrators have held, almost universally, that employers were not entitled to diagnose when providing proof for sick leave¹⁴¹ or when filling out a medical certificate, at least in the first instance. More medical information may be required on a case by case basis as the sick leave continues. Most arbitrators found that what was required for proof of legitimate absences is reasonable evidence that the employee was in fact absent from work due to illness and injury, a level of disclosure which did not require revealing the actual diagnosis, which is seen as highly private.¹⁴²

British Columbia arbitrators have had a different view generally and held that diagnosis was something an employer was entitled to for administering sick leave plans, although many did place a high value on protecting the privacy and dignity of the individual. For example, one BC arbitrator said that special privacy interest which attaches to medical information. The doctor-patient relations is one of the most private information should receive no broader situation than is *reasonably necessary*.¹⁴³

¹³⁷ *Ibid* at para 1.

¹³⁸ *Ibid* at para 33.

¹³⁹ *Ibid* at paras at 34-36.

¹⁴⁰ *Ibid* at paras at 37, 43, 49.

¹⁴¹ See, for example, *Ottawa Citizen and Ottawa Newspaper Guild*, (1996) 58 LAC (4th) 209 (ON LA) (Dumoulin); *York County Hospital and SEIU*, (1992) 25 LAC (4th) 189 (Fisher) (ON LA).

¹⁴² See, for example, *Re St. Jean De Brebeuf Hospital and Canadian Union of Public Employees, Local 1101*, (1977) 16 LAC (2d) 199 (ON LA) (Swan), for the first of a long line of Ontario cases.

¹⁴³ See, *British Columbia Public Schools Employers v BC Teachers' Federation*, (2004) unreported decision of C. Taylor, at paras 20 and 24 [emphasis added], cited in *BC Health Employers*, *supra* note 108.

Arbitrator Surdykowski, in *HHS I Medical Form Grievance*, discussed above with respect to the issues raised by overly broad forms, opened up a new can of worms, at least in Ontario, by allowing the employer to require the disclosure of "the general nature of the illness or injury."¹⁴⁴ In *HHS I Medical Form Grievance*, Arbitrator Surdykowski questions whether the BC approach of allowing nature of condition to be disclosed should be adopted in Ontario:

A diagnosis or statement of the nature of an illness is undoubtedly confidential medical information. There is a broad and consistent arbitral and judicial consensus that in the absence of contractual provision binding on the employee an employer has no right to a diagnosis. I agree. The British Columbia jurisprudence draws a distinction between a "diagnosis" and a statement of the "nature of the illness." Is there a meaningful distinction between "diagnosis" and "nature of the illness" such that an employer is entitled to the latter in the first instance?¹⁴⁵

He rightly asks whether there is a meaningful distinction between "diagnosis" and nature of the illness." Yet, Arbitrator Surdykowski ultimately decides that while diagnosis and symptoms and treatment plan area cannot be demanded to be disclosed, the employer hospital can ask for "a statement of the general nature of the illness or injury."¹⁴⁶ This raises a host of practical problems and undermine his other comments that affirm the protection of privacy.

In our view, the difference between revealing a medical diagnosis and the general nature of an illness is a distinction without a difference. If an employee does not have to reveal diagnosis is it any better to have to reveal nature of the illness? And how does that work in practice? If an employee has a diagnosis of breast cancer, what is she to reveal for nature of the illness? Cancer? Or if she has depression is the diagnosis the DSM V term and the general nature of the illness "mental health?" Is that going to protect her from the stigma attached to such conditions?

The general nature of the illness or condition does not appear to be an appropriate substitute for the disclosure of diagnosis if the goal is protecting privacy. In practice, it is difficult to make this distinction and physicians are likely to disclose diagnosis in response to queries regarding the nature of an illness. In any case, it is easy enough for the employer to guess the diagnosis once nature of the medical condition is revealed.

¹⁴⁴ *HHS I Medical Form Grievance*, *supra* note 3 at paras 66-67.

¹⁴⁵ *Ibid* at para 29.

¹⁴⁶ *Ibid* at para 65.

In the *HHS I Medical Form Grievance*, Arbitrator Surdykowski acknowledges that disclosing the nature of illness often results in the implicit disclosure of diagnosis:

Arbitrators who have concluded that particular collective agreements do not require medical diagnoses to be disclosed to the employer have observed that the employer can often guess the diagnosis from the *restrictions or other accommodations that are suggested by a doctor. That is, a diagnosis can often be discerned even when it is not specifically stated.* If so, one might well ask: so why not provide the diagnosis? And how can one reasonably object to providing information which will probably also disclose the diagnosis when that information is reasonably required for return to work or accommodation purposes? Is the situation different when an employee is seeking STD benefits? And if it is, and strict limits are imposed on the use of the information that must be disclosed in the first instance for those purposes, what is the likely result? *Could limiting an employer's access to confidential medical information result in applications for sick leave benefits being rejected more often, perhaps requiring more frequent resort to the expensive and time-consuming grievance arbitration process? If so, how does it serve the employee seeking benefits, the privacy interests of that employee, the interests of the parties, or the health system?*¹⁴⁷

Arbitrator Surdykowski reconciles these perspectives by stating that if the matter goes to arbitration, the employee's diagnosis will likely need to be disclosed, as the medical certificate will likely be deemed insufficient.¹⁴⁸ This fails to adequately apply the privacy provisions in the legislation. It also glosses over any discussion regarding the disclosure of diagnosis in the context of mental illness, which raises serious concerns in terms of stigma.

Instead, Arbitrator Surdykowski then reverts back to a broad notion of privacy:

But the real world also includes a society mandated legislated right to privacy, and the fact that narrow disclosure of medical information may have unfortunate or unintended consequences in an individual case, or that broad disclosure of medical information may be appropriate or required in preparation for or during a grievance arbitration (or other legal) proceeding does not alter the analysis. Either an employee has privacy rights or she does not. A right that cannot be exercised is no right at all. Although early broad disclosure might prove to have been useful in a particular case, this does not mean that such broad disclosure is necessary

¹⁴⁷ *Ibid* at para 42 [emphasis added].

¹⁴⁸ *Ibid* at para 44.

or appropriate in the first instance in every case as a matter of general policy. There are many business or other matters on both sides of the labour relations divide that are "confidential" outside of the grievance litigation process which are no longer confidential for litigation purposes once the grievance arbitration process is invoked. That does not suggest that they should not remain confidential outside of the litigation process.¹⁴⁹

Although *HHS I Medical Form Grievance* is notable as it is the first and leading case regarding the consideration of *PHIPA*, it falls short of providing a framework for arbitrators to apply *PHIPA*. Instead, it sets the precedent that disclosure of the nature of an illness is required for STD benefits. However, it fails to elucidate a rationale as to why or how this requirement flows from the robust protections of privacy in *PHIPA*. How can *PHIPA* "comprehensively" protect medical information while also allow the disclosure of the nature of illness? This tension is not explored in the decision. This suggests that the precedent in *HHS I Medical Form Grievance* regarding the disclosure of the nature of an illness may be in contradiction with the statutory protections of privacy.

Consequently, as long as employer policies do not expressly violate *PHIPA*, the collective agreement and do not explicitly require the disclosure of diagnosis or of an employees' entire medical file, *HHS I Medical Form Grievance* suggests that such policies or requests for production will be upheld at arbitration. This has significant implications for privacy, specifically in terms of individuals with mental health issues.

In *Providence Care, Mental Health Services and O.P.S.E.U., Local 431 (Winton) (Providence Care)*,¹⁵⁰ Arbitrator Surdykowski evaluates a request for disclosure regarding the grievor's entitlement to STD benefits. The union, in our view, rightly argued that the distinction in *HHS I Medical Form Grievance* between nature of illness and diagnosis is a "false dichotomy."¹⁵¹ Arbitrator Surdykowski states that diagnosis and "nature of illness" are not mutually exclusive categories:

A description of the nature of an illness or injury will tend to suggest a diagnosis to some extent. However, I continue to be of the view that nature of illness (or injury) is a general statement of same in plain language without an actual diagnosis or other technical medical details or symptoms. Diagnosis and nature of illness are not synonymous terms, but there is an overlap between them, such that a description of the nature of an illness or injury

¹⁴⁹ *Ibid* at para 45.

¹⁵⁰ 2011, 204 LAC (4th) 345 (ON LA) (Surdykowski) [*Providence*].

¹⁵¹ *Ibid* at para 31.

may reveal the diagnosis and in others it will not. That this is the case is a consideration, but it is not the determining factor. *An employee's privacy rights are an important consideration, but they are not [the] only or determining consideration.*¹⁵²

Arbitrator Surdykowski's statement highlights that requiring employees to disclose the nature of their illness will likely reveal a diagnosis, which is very troubling, especially in the context of mental illness. As in *HHS I Medical Form Grievance*, it is unclear how this arbitral principle accords with the legislative protections for privacy, as this assertion is made without a consideration or analysis of any statutory schemes.¹⁵³

In *Providence Care*, Arbitrator Surdykowski further notes that disclosing the nature of the illness is reasonable as the medical system is overburdened, resulting in family physicians often acting as advocates for their patients.¹⁵⁴ This is a problematic statement. It undermines the opinions of treating physicians, doctors who have a much more in depth knowledge of the employee's health needs than a doctor of the employer's choice, paid by the employer, who sees the employee for a single consultation.

This assumption that a doctor would modify their opinion to "advocate" for their patient is not found in the Privacy Commissioner case law, discussed above in section IV. For instance, in the case discussed at footnote 52, the Canada Privacy Commissioner felt that the statement of the employee's treating doctor should have sufficed; there is no assumption of bias as an "advocate."

The grievor in *Providence Care* was required to submit information on the nature of their illness. Although each case is ultimately determined by the facts, the approach in *Providence Care* seems somewhat punitive. Assuming that an employee's treating physician is biased as a starting point seems to reflect a preconception regarding employee abuse of sick leave or benefit systems or a 'presumption of guilt.'

In the recent decision of *Complex Services Inc. (c.o.b. Casino Niagara) v Ontario Public Service Employees Union, Local 278 (CAB Grievance) (Complex Services)*¹⁵⁵ Arbitrator Surdykowski again addresses the tension between the disclosure of the nature of the illness and diagnosis. *Complex Services* involves a grievance which alleged that the employer failed to accommodate a disabled

¹⁵² *Ibid* at para 33 [emphasis added].

¹⁵³ Arbitrator Surdykowski does reference *PHIPA* in the passage that he quotes from his decision in *HHS I Medical Form Grievance*, however, as discussed above, he does not apply the provision to assess if the employer has a statutory right to obtain the nature of a disabled employee's illness. See, *ibid* at para 18.

¹⁵⁴ *Ibid* at para 30.

¹⁵⁵ (2012), 217 LAC (4th) 1 at para 61 (ON LA) (Surdykowski) [*Complex Services*].

grievor by refusing her work after returning from medical leave and allegedly harassing her by requiring further medical documentation.¹⁵⁶

The grievor in *Complex Services* was originally on leave for a physical disability but experienced mental health issues during her leave.¹⁵⁷ She returned to work and was then asked to take a second leave because of concerns of her "medical fitness."¹⁵⁸ The grievor presented medical documentation, including doctors' notes, which disclosed that she had a mental illness, but did not specify the nature of the illness or how it affected her ability to return to work.¹⁵⁹ The employer then grieved that the union and grievor failed to meet "their respective obligations" in the accommodation process.¹⁶⁰

Arbitrator Surdykowski states that the need for detailed medical evidence is especially pertinent in the context of mental illness, as the jurisprudence is focused on physical disability, and mental health is often "invisible" due to pervasive stigma and stereotypes. However, Arbitrator Surdykowski does not discuss the ramification of this disclosure in terms of stigma and stereotyping. Further, *Complex Services* does not discuss privacy legislation.

Arbitrator Surdykowski rules that the employer is therefore entitled to "sufficient information to permit it to satisfy its accommodation obligations:"¹⁶¹

An employee can neither expect accommodation if she withholds the information necessary to establish that she requires it, nor dictate the accommodation required. [citations omitted]. The employer cannot be faulted if the employee fails or refuses to provide sufficient information to establish that accommodation is necessary, or to establish the accommodation required. *The medical information that establishes that the employee has a disability that requires accommodation may not be, and more often than not will not be, sufficient for accommodation purposes.*¹⁶²

In summarizing the arbitral jurisprudence on disclosure of medical information in the accommodation process, Arbitrator Surdykowski concludes that "the following otherwise confidential medical information will generally be required for accommodation purposes:"

¹⁵⁶ *Ibid* at paras 3, 5, 34.

¹⁵⁷ *Ibid* at paras 35, 41-42.

¹⁵⁸ *Ibid* at paras 35, 41-42.

¹⁵⁹ *Ibid* at paras 119-20.

¹⁶⁰ *Ibid* at paras 2, 72.

¹⁶¹ *Ibid* at para 88.

¹⁶² *Ibid* at paras 88-89 [emphasis added].

1. The nature of the illness and how it manifests as a disability (*which may include diagnosis, particularly in cases of mental illness*);
2. Whether the disability (if not the illness) is permanent or temporary, and the prognosis in that respect (i.e. the extent to which improvement is anticipated, and the time frame for same);
3. The restrictions or limitations that flow from the disability (i.e. a detailed synopsis of what the employee can and cannot do in relation to the duties and responsibilities of her normal job duties, and possible alternative duties);
4. The basis for the medical conclusions (i.e. nature of illness and disability, prognosis, restrictions), including the examinations or tests performed (but not necessarily the test results or clinical notes in that respect);
5. The treatment, including medication (and possible side effects) which may impact on the employee's ability to perform her job, or interact with management, other employees, or "customers."¹⁶³

As applied to the facts, the grievor in *Complex Services* erred in believing that her right to privacy was "absolute."¹⁶⁴ The grievor's medical evidence regarding her mental illness is characterized as failing to provide sufficient information regarding its nature and how it affected her ability to return to work.¹⁶⁵ It was thus deemed inadequate.¹⁶⁶ Consequently, the employer's request for further information was not ruled to constitute harassment.¹⁶⁷ Arbitrator Surdykowski ordered that the employer was entitled to seek an Independent Medical Review of the grievor's medical information in order to assess her disability and how she could be accommodated in the workplace.¹⁶⁸

Complex Services thus stands for the principle that an employee cannot expect to be accommodated without providing the necessary disclosure of confidential medical information. Although what is deemed necessary is context contingent, merely disclosing the presence of disability will not suffice. The provision of

¹⁶³ *Ibid* at para 95 [emphasis added].

¹⁶⁴ *Ibid* at para 116.

¹⁶⁵ *Ibid* at paras 119-20.

¹⁶⁶ *Ibid*.

¹⁶⁷ *Ibid*.

¹⁶⁸ *Ibid* at paras 126-28.

further information regarding the nature of the disability may necessitate the disclosure of diagnosis. *Complex Services* also affirms that the nature of disability and diagnosis may overlap. In the context of mental illness, it may be difficult to reveal the nature of the disability without disclosing the grievor's diagnosis. Issues of stigma and the sensitivity of mental health information is not, in our view, adequately addressed in this case.

In *United Food & Commercial Workers, Local 206 v G&K Services Canada Inc. (Kostyniuk Grievance) (United Food)*,¹⁶⁹ the employer requested further medical information regarding the accommodation for a grievor with mental illness.¹⁷⁰ The grievor refused to provide further medical information and was progressively disciplined for termination, eventually resulting in termination.¹⁷¹

Arbitrator Gee ruled that as the grievor previously took multiple extended medical leaves solely on the basis of a doctor's note, it was reasonable for the employer to request further documentation.¹⁷² However, such requests must be made in accordance with *PHIPA*, which stipulates that the release of medical information must be consensual.¹⁷³ Arbitrator Gee explains that:

The language of the *PHIPA* is clear and unambiguous. It provides that an individual's consent to the disclosure of medical information cannot be obtained through deception or coercion. Quite simply, permitting an employer to coerce an employee into signing an Authorization for the release of medical information and giving it to their doctor, thereby putting the doctor in the position of unwittingly contravening the *PHIPA*, flies in the face of the protections afforded by the *PHIPA* and cannot be condoned. Directing an employee to sign a consent for the release of personal medical information under threat of disciplinary sanctions is coercion. An employee is entitled to refuse and any discipline imposed is not just.¹⁷⁴

Consequently, disciplining the grievor for failing to disclose the medical information does not constitute just cause.¹⁷⁵ Arbitrator Gee subsequently ordered that the grievor be reinstated.¹⁷⁶

¹⁶⁹ [2013] OLAA 221 (Gee) [*United Food*].

¹⁷⁰ *Ibid* at paras 3, 98-100.

¹⁷¹ *Ibid* at para 3.

¹⁷² *Ibid* at paras 98, 101.

¹⁷³ *Ibid* at para 112.

¹⁷⁴ *Ibid* at para 113.

¹⁷⁵ *Ibid* at para 114.

¹⁷⁶ *Ibid*.at para 118

Arbitrator Gee then provides a framework in which the employer can make a “clear” and “concise” request for further medical information, such as:

1. The *general nature of the grievor's illness and how it manifests as a disability*;
2. The prognosis for improvement and the time frame for same;
3. The restrictions or limitations that typically flow from the disability (i.e. a detailed synopsis of what the grievor can and cannot do in relation to the duties and responsibilities of his normal job duties, and possible alternative duties);
4. The basis on which the doctor has reached her medical conclusions as to the nature of the disability, prognosis, and restrictions including the identification of any examinations or tests performed (but not necessarily the test results or clinical notes in that respect);
5. The treatment, including medication (and possible side effects) which may impact on the employee's ability to perform [their] job;
6. Any further information that the Employer legitimately requires in order to investigate accommodation options.¹⁷⁷

This framework is highly similar to that in *Complex Services* but does not specifically include the disclosure of diagnosis. As in *Complex Services*, the framework in *United Food* regarding disclosure is presented without any reference to the statutory protections of privacy under *PHIPA*.

(f) Arbitrators Application of *Jones v. Tsig*

The few arbitrators who have discussed *Jones* in the context of the disclosure of medical records are all of the view that the decision does not signify a change or an "absolute right to privacy."¹⁷⁸ It appears that *Jones* symbolically affirms individual rights to privacy, but has yet to alter arbitral analysis in terms of the scope of disclosure of confidential medical information.

*Complex Services*¹⁷⁹ represents the most in depth analysis and application of *Jones* in the context of labour arbitration. In applying *Jones* in this context,

¹⁷⁷ *Ibid* [emphasis added].

¹⁷⁸ *Complex Services*, *supra* note 155 at para 92.

¹⁷⁹ *Ibid*.

Arbitrator Surdykowski states that the Court of Appeal decision "reinforces the premium value of privacy in Canadian society," but "does not establish an additional premium or value in that respect."¹⁸⁰ Further, *Jones* does not stand for the principle that requiring the disclosure of "confidential medical information for a legitimate purpose constitutes an improper or actionable intrusion on the employee's right to privacy."¹⁸¹ There is thus no "absolute right to privacy."¹⁸²

Arbitrator Surdykowski further clarifies in *Complex Services* that *Jones* does not alter any of his previous rulings, such as *HHS I Medical Form Grievance* and *Providence Care*, in which he ruled that employers are entitled to receive employee's medical information "to answer legitimate employment related concerns, or to fulfil its obligations under the collective agreement or legislation."¹⁸³

Arbitrator Surdykowski concludes his analysis of *Jones* by stating that:

I agree with the Employer that nothing in *Jones v Tsigie* alters its right to manage its workplace(s), or to obtain confidential medical or other information as required or permitted by legislation or the collective agreement, or which it reasonably requires for a legitimate purpose. Of course, it remains the case that the employer is only entitled to the confidential information necessary for the legitimate purpose. Even then the employee can refuse to disclose her confidential medical or other information, although if she does she must accept the consequences of exercising that right of refusal. Refusing to allow access to necessary confidential medical information may justify the employer's refusal to allow the employee to continue or return to work, or stymie the accommodation process, result in the loss of disability benefits, or even lead to the loss of employment.¹⁸⁴

In ruling in *United Food* that the employer's requests for further medical disclosure is reasonable, Arbitrator Gee quotes Arbitrator Surdykowski's analysis of *Jones* in *Complex Services*, stating that the Court of Appeal decision does not alter the analysis regarding the disclosure of confidential medical information.¹⁸⁵ No further analysis of *Jones* is provided.

¹⁸⁰ *Ibid* at para 92.

¹⁸¹ *Ibid* at para 93.

¹⁸² *Ibid*

¹⁸³ *Ibid*

¹⁸⁴ *Ibid*.

¹⁸⁵ *United Food*, *supra* note 169 at paras 96, 98, 101.

In *Hamilton International Airport Ltd. v Canadian Union of Public Employees, Local 5167, Airport Unit (Lawson Grievance)*,¹⁸⁶ the union grieved the denial of STD disability benefits provided under the collective agreement.¹⁸⁷ The employer argued that the grievance was not arbitrable, as the provision of benefits flowed from a private contract between the insurer and the grievor.¹⁸⁸

Arbitrator Surdykowski disagreed, ruling that the employer's decision to contract out to a third party insurer does not erase the employer's responsibility to administer and oversee the delivery of STD benefits. Noting that the matter involves privacy concerns, Arbitrator Surdykowski cites *Jones* as affirming a common law right to privacy, such that:

every employer's access to employee confidential medical or other information is limited to the exercise of the employer's legitimate rights or obligations. These include the right to medical evidence for the purposes of attendance management purposes, or for disability benefits or accommodation purposes. The fact is that most employers have little or no expertise in these respects and engage medical health or other professionals to assist them in the exercise of their rights or to comply with their obligations with the appropriate privacy screens in place. Like every other employer, the Employer in this case will have to educate itself and obtain the assistance it requires to defend the grievance. In that respect, although Empire Life cannot be compelled to participate as a party to the proceeding, its conduct and decision(s) on behalf of the Employer are not immune from review in this proceeding, and Empire Life can be compelled to attend the hearing to produce documents and otherwise provide evidence in that respect.¹⁸⁹

The grievance was thus held to be arbitrable and the employer's preliminary objection to jurisdiction was dismissed.¹⁹⁰

In *Canadian Bank Note Co. and I.U.O.E., Local 772, Re*¹⁹¹ Arbitrator Surdykowski assessed if the employer had a right to require that employees who miss more than three consecutive shifts submit a medical certificate of disability. Arbitrator Surdykowski notes that the recognition in *Jones* of a "common law right to privacy and concomitant a tort" results in requiring the

¹⁸⁶ [2012] OLAA 650 (Surdykowski).

¹⁸⁷ *Ibid* at paras 1, 6, 10.

¹⁸⁸ *Ibid* at para 34.

¹⁸⁹ *Ibid*.

¹⁹⁰ *Ibid* at para 38.

¹⁹¹ 2012 CLB 22724 (ON LA) (Surdykowski) [*Canadian Bank*].

"rectification" of his comments in *HHS I Medical Form Grievance*, in which he stated that "it is far from clear that there is a common law right to privacy."¹⁹²

Arbitrator Surdykowski then affirms his statements in *Complex Services*, further stating that:

Under a collective bargaining regime the nature and extent of employer and bargaining unit employee rights with respect to confidential medical information depend on the applicable legislation and the provisions of the particular collective agreement, including the extent to which the applicable STD or other benefit plan form part of the collective agreement.¹⁹³

Unless the collective agreement provides otherwise, it is not inordinately invasive for an employer to ask for a medical certificate which includes the reason for the absence in issue (consisting of a general statement of the nature of the disabling illness or injury, without diagnosis or symptoms), that the employee has a treatment plan and is following that plan (but not the plan itself), the expected return to work date, and the work the employee can or cannot be expected to perform upon his return to work. As a general matter, unless the collective agreement specifies otherwise or there is reasonable cause to doubt its *bona fides*, such a document completed by an appropriate medical health professional constitutes *prima facie* proof which satisfies the employee's first instance reporting obligations for absence and sick leave benefits purposes. Although it can ask, in the first instance the employer cannot require an employee to consent to a release of the employee's general medical history, a diagnosis, a treatment plan (as distinct from the fact that there is one and that it is being followed), or a medical prognosis other than an expected return to work date and potential restrictions. The fact that providing the nature of illness or injury may suggest a diagnosis or medical history does not excuse the employee from providing the reason in order to satisfy the onus to justify the absence or claim benefits even in the first instance.¹⁹⁴

The limits on the employer's right to confidential medical information in the first instance do not prohibit the employer from subsequently requiring further relevant and appropriate information when required in a particular case because the first instance

¹⁹² *Ibid* at para 35; *HHS I Medical Form Grievance*, *supra* note 3 at para 20.

¹⁹³ *Canadian Bank*, *supra* note 191 at para 28.

¹⁹⁴ *Ibid* at para 29.

information is insufficient or the absence is suspicious, or if accommodation is required or the employer has a reasonable concern for the safety of a returning worker or other employees. However, an employer which seeks diagnostic or other additional confidential medical information must demonstrate a legitimate need for specific such information on an individual case-by-case basis.¹⁹⁵

Applying these principles, Arbitrator Surdykowski rules that that the employer does not have the right to require every employee that is absent from work to provide a completed medical form without assessing if it is "reasonably necessary in the circumstances," thus necessitating that the employer exercise its discretion in a good faith.¹⁹⁶

Finally, *Alberta v Alberta Union of Provincial Employees (Privacy Rights Grievance) (Alberta)*¹⁹⁷ represents the only application of *Jones* by arbitrators outside of Ontario to date. *Alberta* involved a grievance brought by 26 government employees for damages to breach of privacy stemming from an "unjustified credit check on their personal affairs." Arbitrator Sims notes that the grievance paralleled the facts in *Jones*, as both cases concerned an improper use of personal financial information. However, there are also "important differences" between the two cases:

Firstly, that case was an action between the victim, Ms. Jones and the actual perpetrator, Ms. Tsige, not against the Bank of Montreal as Ms. Tsige's employer. It did not arise in the context of Ms. Jones' employment, she was simply a bank customer. Ms. Tsige acted for personal reasons unrelated to her job rather than the situation here where the peace officer was carrying out a task assigned by the employer, but in an unauthorized and overzealous manner. Here the grievor's personal data, that allowed access to their credit records, was in the employer's hands as a result of their employment, which carries the implication that the employer would protect that information and ensure its use for only legitimate purposes. In *Jones*, the invasion of privacy occurred over four years and involved 174 separate intrusions into Ms. Jones' bank account, with the clear potential that the information gained would not be restricted and would be used to influence her personal affairs or those of her ex-husband.¹⁹⁸

¹⁹⁵ *Ibid* at para 30.

¹⁹⁶ *Ibid* at para 31.

¹⁹⁷ (2012) 221 L.A.C. (4th) 104 (AB LA) (Sims).

¹⁹⁸ *Ibid* at para 20.

Without further discussion of *Jones*, Arbitrator Sims rules that the employer is liable to each grievor for damages, as the breach of privacy was "one of real significance in terms of the grievors' privacy rights and their sense of security and well-being as employees."¹⁹⁹

(g) Privacy as a Sword, Not a Shield in the Workplace: Discipline Cases

While arbitrators are not keen to jump on privacy statutes as a means of protecting employees' privacy rights regarding medical information, they are not shy about using it to uphold discipline. Across Canada, especially in the last two years, there has cropped up a new line of arbitration cases that in which employees are disciplined for breaching the privacy rights of others by accessing medical records in the workplace outside of their required duties. What may have been previously tolerated behavior of clerks and health professionals giving into curiosity and looking at medical records they could access in the workplace, this conduct now attracts serious discipline, including termination.

For instance, in *Ontario Nurses' Association and North Bay Health Centre (McLellan Grievance) (North Bay Health Centre)*²⁰⁰ the grievor, a Registered Nurse, was dismissed for accessing patient medical records on units to which she was not assigned. The grievor accessed over 5,000 individual patient health records over a seven-year period. The nurse asserted that under section 37(l)(d) of *PHIPA*, she was entitled to access the medical information in question for learning purposes. The arbitrator, however, found that the vast majority of the grievor's access to patient information was improper, as the grievor did not regard the care of the patients when accessing this information.

Unlike in *Jones*, where the employee accessed confidential financial information for personal vindictive reasons involving an ex-spouse, in *North Bay Health Centre*, the nurse accessed the information for learning purposes and curiosity, not spite. In *Jones*, the bank did not terminate the employee Tsige, instead, she was suspended for a week without pay and denied a bonus.²⁰¹ In *North Bay Health Centre*, the employer fired the nurse and the arbitrator upheld the termination. The arbitrator said that the employer had just cause to terminate the grievor because of the volume of the grievor's unauthorized access to patient records. Query what the Privacy Commissioner, who scrutinizes institutions privacy systems, would have said if reviewing the hospital's record keeping systems, which allowed employees such wide spread access over seven years. Notably, the arbitrator had no criticism of the hospital.

¹⁹⁹ *Ibid* at para 32.

²⁰⁰ 216 LAC (4th) 38 (ON LA) (Abramsky).

²⁰¹ NB: Tsige was not a unionized employee. See, *Jones*, *supra* note 42 at para 6.

Moreover, the arbitrator in *North Bay Health Centre* stated that the grievor knew or should have known that her access to patient records was improper, as the grievor never sought permission to access the files for learning purposes. Given that the grievor started this practice in 2003 and there were no other similar nurses cases on this point of accessing information for learning purposes, it is unclear why termination, as opposed to progressive discipline, was justified.

In *Timmins & District Hospital and ONA (Peever)*,²⁰² which was issued in the same year as the *North Bay Health Centre*, another nurse was discharged for having improperly accessed patient records. In this case the access occurred only twice but was for personal reasons. The patient was a former spouse of grievor's son and mother of grievor's grandchild, with whom grievor had no clinical relationship. The patient was in a custody dispute with the grievor's son and was admitted to mental health unit. The grievor claimed she accessed the patient's health file out of concern for the patient's medical condition. There was no evidence grievor disseminated any information. The arbitrator found a violation of trust and a serious breach of *PHIPA*, employer policies and professional ethics of the nursing profession. Despite a clean record over 22 years of service, the discharge was upheld.

In *British Columbia Nurses' Union and Vancouver Hospital and Health Sciences Centre (Pattison Grievance)*²⁰³ a clinical nurse was dismissed by the Vancouver Hospital for a breach of confidential patient information. The arbitrator found that the grievor's failure to adhere to the standards of confidentiality of patient information by initially accessing records for purely personal reasons and then repeatedly communicating that information to others, despite being cautioned after the first communication, was just cause for dismissal.

Clerks, unlike nurses, seem to get a more sympathetic consideration by arbitrators in these privacy breach discipline cases. In the 2010 case, *Kingston General Hospital and CUPE (Henderson)*²⁰⁴ the grievor, a billing clerk, was discharged for breaching confidentiality of patient records. The grievor was a short-service employee with no prior discipline record who admitted accessing medical records of his former spouse and confirmed that he shared information with his lawyer. The grievor admitted that he subsequently instructed his lawyer not to make use of the information in ongoing court proceedings. The grievor had sole custody of his two children, as well as significant hearing impairment which limited his employment prospects. The arbitrator found that the employer failed to demonstrate that the grievor actually made use of information for personal gain. The arbitrator found that the discharge was excessive and the grievor was reinstated with a two-month suspension substituted.

²⁰² 208 LAC (4th) 43 (ON LA) (Marcotte).

²⁰³ [1997] BCCA 97 (Dorsey).

²⁰⁴ 104 CLAS 222 (ON LA) (Stephens).

In *Newfoundland and Labrador Assn. of Public and Private Employees v Eastern Regional Integrated Health Authority (Butler Grievance)*,²⁰⁵ the employer argued it had just cause to discharge the grievor, a clerical worker, because she accessed several patient records in breach of the employer's policy and Newfoundland's *Personal Health Information Act*. The union maintained that the grievor did not access the information for personal gain but did so only at the request of the person whose records were accessed (i.e. looked up her friends' information at their request).

The arbitrator found that there was a serious breach of patient privacy and confidentiality, having regard to the number of patients and the number of breaches. However, the arbitrator also found that the seriousness of the breaches was mitigated by the explanation for the access, the fact that the grievor did not disclose information to anyone other than the patient and the absence of any personal gain to the grievor. Other mitigating factors included that the grievor testified that she did not know that it was wrong to provide information to friends at their request. The arbitrator held the employer did not have just cause to impose the penalty of discharge and reinstated the grievor with a lengthy eight month suspension without pay, benefits or accumulation of seniority.

In *Saskatchewan Assn. of Health Organizations and CUPE, Local 5111 (Priest)*²⁰⁶ the grievor was employed as health records clerk. While on maternity leave, the grievor's husband's cousin was hit by car and the grievor stopped into the medical records department and accessed the cousin's medical chart. She was subsequently discharged. The arbitration board found the grievor's behaviour was serious, but not gross misconduct, as, although intentional and premeditated, was an isolated incident. While the grievor readily accepted "ownership" for her misconduct and admitted she was wrong, the board thought that the grievor deflected the root of the problem to the employer for not holding other employees accountable for similar breaches. The board found the termination excessive and a lengthy suspension substituted. No comment was made about the fact that the employer was in breach of the privacy statute, although improper access to confidential medical information appeared to be a systemic problem.

In contrast, outside the recent rash of cases dealing harshly with employees who breach privacy is an earlier BC case which deals with privacy breaches as merely a breach of an employer policy. In *Central Vancouver Island Health Region, South Health Area (on Behalf of Cowichan Lodge) and the Hospital Employees' Union*,²⁰⁷ two health care aides were given two month suspensions for "a breach of the Hospital's Policy on Confidentiality." The arbitrator substituted a one day suspension and a five day suspension for the two

²⁰⁵ 225 LAC (4th) (NF LA) 1 (Oakley).

²⁰⁶ 207 LAC (4th) 1 (SA LA) (Hood).

²⁰⁷ [1998] BCCAAA 369 (Laing).

grievors, with full back pay. As this case occurred prior to the introduction of privacy legislation, there was no discussion of statutory privacy obligations, nor was common law privacy considered. Instead, the improper access was simply dealt with as a breach of the hospital's policy.

There are additional older cases dealing with privacy issues and discipline.²⁰⁸ But the recent rash of cases upholding terminations or severe discipline for employees looking at medical records outside what is necessary for their workplace duties indicates that employers and arbitrators both are much more willing to use privacy legislation and principles as a sword against employee than a shield to defend the workers privacy.

VI. Conclusions

Despite a history of common law and arbitral principles as well as statutory schemes recognizing privacy rights, when it comes to medical information in the Canadian arbitral world, a review of recent jurisprudence suggests that workers are failing to receive the robust protections and standards set out in the legislation and Privacy Commissioner decisions.

The significance of individual privacy rights and the frequency in which medical issues arise in the workplace demands that arbitral law develop and apply an appropriate privacy framework that truly protects what we all agree are "fundamental" rights of privacy over one's medical information in the workplace. While in 1881²⁰⁹ the courts may have recognized that individuals, by virtue of becoming employees, do not forfeit their privacy rights, our review of arbitration cases in the last five years indicates we have a long way to go to implement these principles in the labour context.

²⁰⁸ See also, *SGEU v Saskatchewan (Wolfe Grievance)*, [2003] SLAA 2 (Pelton); *Health Employers Assn of British Columbia and Hospital Employees' Union*, [2001] AGAA 44 (Power).

²⁰⁹ See, *Latter*, *supra* note 2.